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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RICHARD E. TAPERT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court and United States Court of Appeals for the Sixth Circuit improperly assumed facts which were absent from the record and applied the incorrect legal standard in determining what constitutes a breach of an immunity agreement?

2. Whether the district court erred when it determined that Dunaway was not a member of the Derrick conspiracy, thereby denying Petitioner the protection from prosecution to which he was entitled pursuant to his immunity agreement?

3. Whether a claim of immunity is a "jurisdictional" claim under the "*Blackledge-Menna*" Doctrine, thereby excepting such claim from the general rule foreclosing appeal by a defendant who pleads guilty pursuant to Rule 11 of the Federal Rules of Criminal Procedure?

4. Whether the federal judiciary is empowered to review the rulemaking process utilized in enacting § 2D1.1 of the United States Sentencing Guidelines pursuant to the Administrative Procedures Act?

5. Whether in promulgating a guideline which incorporates a gross weight based sentencing scheme, the Sentencing Commission exceeded the scope of its statutory grant of authority?

6. Whether a gross weight based sentencing scheme violates the due process clause of the Fifth Amendment to the United States Constitution because it leads to disparate sentences?

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OPINIONS BELOW

The opinion for the United States Court of Appeals for the Sixth Circuit filed May 19, 1993, affirming the opinion of the United States District Court for the Eastern District of Michigan Southern Division, is reproduced at Appendix D, *infra*, pp. 7a-27a.

The Order of the United States Court of Appeals for the Sixth Circuit denying rehearing dated July 14, 1993 is reproduced at Appendix B, p. 2a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Criminal Procedure in relevant part states:

> (2) *Conditional pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty. . . , reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pre-trial motion.

Section 2D1.1 of the United States Sentencing Commission's *Guidelines Manual* and the application notes thereto, expresses that unless otherwise specified, the weight of a controlled substance set forth in the [drug equivalency] tables refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

U.S. Const. Am. V provides in relevant part:

> [N]or shall any person . . .be deprived of life, liberty, or property, without due process of law. . .

Section 841(b) of Title 21 provides in pertinent part:

> (a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufactu :, distribute, or dispense, or possess . . ., a controlled substance . . . .

Section 553 of Title 5 reads in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register . . . .
>
> The notice shall include -
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> * * *
>
> (c) . . . *After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.* (Emphasis supplied)

Section 706 of Title 5 provides in relevant part:

> "[T]he reviewing court shall . . .
>
> (2) hold unlawful and set aside agency action, finding, and conclusions known to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

Section 994(x) of Title 28 provides:

> The provisions of Section 553 of title 5, relating to publication in the Federal Register and the public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

STATEMENT OF THE CASE

Richard Tapert, D.O. (hereinafter "Petitioner") applies for leave to appeal from the per curiam decision of the United States Court of Appeals for the Sixth Circuit, affirming judgment in a criminal case.

On March 29, 1991, a second superseding indictment was filed in the Eastern District of Michigan charging Petitioner, Charles Dunaway ("Dunaway") and Daniel Tapert ("Daniel") with conspiracy to possess with intent to distribute and possession with intent to distribute various prescription drugs in violation of 21 U.S.C. § 841(a)(1) and § 846. (R.44).

On June 21, 1991, Petitioner filed a motion to dismiss the superseding indictment with which he was charged based on an immunity agreement which he and the United States Attorney's Office had entered into on March 8, 1989. (R.95 App.). In

exchange for Petitioner's earlier cooperation, the government granted Petitioner transactional immunity from prosecution for the criminal activity which, ultimately formed the basis of the superseding indictment. (R.95, Motion to Dismiss).

The immunity agreement stated:

> . . . for your full, truthful and complete debriefing, grand jury testimony and testimony at trial, if necessary, the Government agrees, based on your full cooperation as indicated, that neither you, your wife nor your children will be prosecuted for any controlled substances or other criminal activity involving yourself and Arthur Derrick, members of his family or his organization, nor for any criminal conduct in which you were involved and which you have revealed to the Government. (App. E, p. 28a).

At the evidentiary hearing held before the district court judge on November 6, 1991, Arthur Derrick ("Derrick")[1] testified that from 1976 to 1982 he traded cocaine for pills with Dunaway. During this and later time periods, Petitioner wrote many prescriptions in Derrick's name and also wrote prescriptions for Derrick through Dunaway. Derrick then relied on Dunaway to supply him with the pills. (Derrick; TR. 11-6-91 at 7-10).

Derrick further testified that in October 1988 he delivered a large quantity of cocaine to Daniel's home with Dunaway present. (Derrick; TR. 11-6-91 at 22-24). Derrick continuously received

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1. Arthur Derrick was indicted and convicted of the offense of Continuing Criminal Enterprise. 21 U.S.C. § 848. Tapert had conducted transactions with Derrick and members of his organization, and the government was interested in securing Derrick's conviction utilizing Tapert's cooperation.

pills from Daniel and from Petitioner prior to October 1988. (Derrick; TR. 11-6-91 at 22-24). Derrick "imagined" he (Dunaway) was also getting pills from Daniel. (Derrick; TR. 11-6-91 at 23). Derrick later discovered that Daniel and Dunaway smoked the cocaine that Derrick delivered in October. (Derrick; TR. 11-6-91 at 24).

Special Agent Richard Crock ("Crock"), of the Drug Enforcement Administration ("DEA"), investigated the "Derrick organization" and testified that in addition to Derrick selling and buying large amounts of cocaine, (Crock; TR. 11-6-91 at 27), he was also involved with prescription drugs. (Crock; TR. 11-6-91 at 30). Crock stated this information was undocumented because his primary focus was on Derrick's wholesale cocaine distribution. (Crock; TR. 11-6-91 at 30). Crock further noted that pursuant to his immunity agreement, Petitioner debriefed with the DEA and discussed prescribing large amounts of controlled substances for Derrick (Crock; TR. 11-6-91 31) for which Petitioner stated he received cocaine. (Crock; TR. 11-6-91 at 32).

Crock also testified that Petitioner provided additional inculpatory information about Derrick. This information was then used to incriminate Petitioner, despite his immunity agreement. While Crock's primary concern was Derrick's cocaine activity (Crock; TR. 11-6-91 at 35), information he received in February 1989 clearly suggested that Derrick was involved in pills (Crock; TR. 11-6-91 at 36) and that Derrick was exchanging pills for cocaine. (Crock; TR. 11-6-91 at 36). Crock, however, performed no follow up investigation nor questioned Tapert any further regarding the revelations.

Karen Mysliwiec ("Mysliwiec"), a DEA diversion investigator, testified that she interviewed Petitioner about his prescription practices in February 1989. (Mysliwiec; TR. 11-6-91 at 38). She later became involved in the investigation of Fredal

Pharmacy in April of 1991.[2] (Mysliwiec; TR. 11-6-91 at 39). Petitioner stated he had delivered prescriptions to Derrick, but the DEA was uninterested in investigating Derrick's prescription activity. (Mysliwiec; TR. 11-6-91 at 42).

The district court ruled that Petitioner failed to establish by a preponderance of evidence that Dunaway was a member of the Derrick organization. Alternatively, the court held Petitioner's failure to disclose Dunaway's involvement in the organization rendered his debriefing untruthful and incomplete and violated his immunity agreement. Therefore, the court ruled Petitioner was precluded from seeking protection under the immunity agreement. (R.136, Memorandum and Order).

Petitioner entered a conditional plea to one count of the superseding indictment. Petitioner then timely filed his objections to the pre-sentence report and the computation of his sentencing guidelines. (R.165). The court rejected Petitioner's objections and utilized the total weight of the pills in determining the sentence. The court sentenced Petitioner to forty-eight months, custody of the Attorney General pursuant to a motion for downward departure filed by the U.S. Attorney's office. (R.147).

Petitioner challenged the district court's denial of his motion to dismiss, and the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") entertained oral argument on the matter. The Court of Appeals affirmed the lower court's decision on the immunity issues as well as its calculation of the applicable guideline range based on a gross weight hand sentencing scheme.

The Court of Appeals also held Petitioner failed to provide a *full, truthful, and complete* de-briefing due to his non-disclosure of Dunaway's participation in the Derrick Organization and the

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2. The investigation of Fredal Pharmacy led to the investigation of Dunaway and the other co-conspirators.

fact that he and/or Derrick were trading pills for drugs with Dunaway. Furthermore, the court incorrectly determined that as a matter of law, Dunaway was not a member of the Derrick organization. These findings (that Petitioner was in violation of the immunity agreement) were not based on the testimony adduced.

Significantly, the district court never heard testimony that Petitioner actually violated the immunity agreement by not giving full and complete debriefing. Petitioner contends that the Court of Appeals implicitly determined that Dunaway was a member of the Derrick Organization, thereby eviscerating this district court finding. Moreover, Petitioner contends that the Court of Appeals engaged in an improper and unsubstantiated fact-finding mission.

The Court of Appeals addressed the inequity of the sentencing scheme employed by the United States Sentencing Commission in § 2D1.1. Petitioner vigorously challenged the guideline, specifically contending that, pursuant to 21 U.S.C. § 841, Congress expressed an intention to consider the entire weight of a "mixture or a substance" only with regard to several enumerated drugs, commonly referred to as street drugs. Persuaded by *United States v. Shabazz*, 933 F.2d 1029 (D.C. Cir. 1991) and *United States v. Lazarchik*, 924 F.2d 211 (11th Cir.), *cert. denied*, 112 S. Ct. 96 (1991), decisions which are without precedential import, the appeals court rejected Petitioner's arguments.

Next, the Court of Appeals addressed Petitioner's argument that the gross-weight approach employed in United States Sentencing Guideline ("USSG") § 2D1.1 violated his Fifth Amendment due process rights. Petitioner asserted the scheme violated notions of substantive due process because it punished a person convicted of illegally distributing diluted controlled substances exactly as a person convicted of selling the same weight/based quantity of "pure" controlled substances. Finding that the gross weight scheme of § 2D1.1 is not based on any arbitrary distinction and is rationally related to the legislative goals

of 21 U.S.C. § 841, the Court of Appeals determined the sentencing commission did not violate Petitioner's due process rights.

Most importantly, the appeals court entertained Petitioner's attack on the gross-weight scheme in § 2D1.1 due to the sentencing commission's failure to comply with the requirements of the Administrative Procedure Act (APA). Petitioner argued that: (1) the scheme did not comply with the requirement for a "concise and general statement" concerning its purpose; (2) the scheme adopted is arbitrary and capricious; and (3) the scheme contravene the sentencing commissions' enabling statute. The Court of Appeals concluded that it lacked authority to review the Commission's rule making process based upon *United States v. Lopez*, 938 F.2d 1293 (D.C. Cir. 1991), the express language of § 994(x), and the legislative intent as reflected in the Senate Committee Report on § 994(x).

This Petition follows.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS IMPROPERLY ASSUMED FACTS WHICH WERE ABSENT FROM THE UNDERLYING RECORD AND MOREOVER, APPLIED THE INCORRECT LEGAL STANDARD IN DETERMINING WHAT CONSTITUTES A BREACH OF AN IMMUNITY AGREEMENT.

The Court of Appeals decision is inconsistent with the district court's ruling. The district court concluded that because Dunaway was not a member of the Derrick "organization", Petitioner was not shielded from prosecution. (R. 136, Memorandum and Order at 2-3). Had the district court correctly determined that Dunaway was a member of the Derrick organization, Petitioner maintains the court

would necessarily have determined that he would have been immune from prosecution.

Curiously, the Court of Appeals placed no reliance on the district court's finding that Dunaway was not a member of the Derrick organization. Nevertheless, the appeals court affirmed the district court's denial of Petitioner's motion to dismiss, holding Petitioner breached the immunity agreement by failing to provide full and complete debriefing testimony. Petitioner asserts that the Court of Appeals concluded that Dunaway was a member of the Derrick organization. Juxtaposed with the district court's earlier determination, the decision of the Sixth Circuit becomes an anomaly. A Catch-22 arises since, if in fact the Court of Appeals determined that Dunaway was a member of the Derrick organization, than the immunity agreement shielded Petitioner from prosecution. On the other hand, if this Court believes that Petitioner breached the agreement then, in fact, it is acknowledging the district court made erroneous findings of fact and law.

A review of the per curiam Opinion indicates that the Court of Appeals affirmed the district court's denial of Petitioner's motion to dismiss for a reason other than that Dunaway was not a member of the Derrick conspiracy. In reaching its determination regarding Petitioner's abrogation of the informal immunity agreement, the Court of Appeals stated: "According to the agents who de-briefed Petitioner, Petitioner did not disclose that Dunaway was part of the Derrick organization or that he and/or Derrick were trading pills for drugs with Dunaway." (Slip Op. at 9).

It is widely accepted that the question of a defendant's breach of an immunity agreement is not an issue to be finally and unilaterally determined by the government. *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.), *cert. denied*, 454 U.S. 831 (1981). By finding Petitioner breached his agreement, the

Court of Appeals effectively endorsed the exact procedure which *Calabrese* explicitly eschewed.

Petitioner's purported failure to disclose Dunaway as a member of the Derrick organization without additional testimony from government agents setting forth all questions asked of Petitioner and a specific showing that he iied or purposely withheld information from government agents, is insufficient to establish a breach. Simply put, a failure to discuss Dunaway with the government, even if this fact were true, without more, does not establish a knowing and intentional breach of the agreement. The record below is absolutely inadequate to determine whether Petitioner was ever specifically asked about Dunaway, and the reason for the non-disclosure, *i.e.*, loss of memory, intent to deceive, misapprehension of the need to disclose the activity, or even a misapprehension that the activity was criminal.

Petitioner contends that the Court of Appeals made a "quantum leap" in order to find that the government proved that Petitioner violated the agreement. The testimony of the agents merely established that they questioned Petitioner about *his own* activities.[3] The agents never testified that they questioned Petitioner concerning Dunaway's activities nor that Petitioner failed to supply information about Dunaway after being asked questions which would have led a reasonable person to have disclosed his activities.

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3. Petitioner was debriefed by Special Agent Richard Crock ("Crock") of the Drug Enforcement Administration on February 15, 1989. The purpose of Petitioner's debriefing was to inculpate Derrick as a major distributor of cocaine: "The focus of my investigation was on the [Derrick's] wholesale distribution of multi-kilograms of cocaine." (Crock Tr., 11/6/91, at p. 30). Crock further stated his investigation of Petitioner did not encompass the involvement of Charles Dunaway *at any point in time*, [Crock Tr., 11/6/91, at p. 33], nor was he even concerned about Petitioner's diversion activities. [Crock Tr., 11/6/91, at p. 31] It was obviously not Petitioner's failure to discuss Dunaway with Crock that constituted the alleged breach.

Further, the government never proved that Petitioner ever lied during the debriefing, nor who it was that called an end to the debriefing — the government or Petitioner. In fact, the hearing testimony failed to disprove whether Petitioner was ever provided an opportunity to tell *all* he knew. While the Court of Appeals chose to assume facts adverse to Petitioner, there is no basis on the record to do so. Just as a court should not infer findings favorable to the government when deciding questions relating to the improper use of immunized testimony, so should this Court be reticent to do so in the context of whether or not there was a material breach of an immunity agreement. *See United States v. Rinaldi*, 808 F.2d 1579 (D.C. Cir. 1987).

There is an utter lack of recorded testimony which would even inferentially allow a conclusion that Petitioner failed to respond promptly, completely, truthfully and co-operatively to Crock's inquiries.[4] Petitioner is a physician, not a trained criminal investigator or an attorney. He was neither schooled in, nor familiar with, the law of conspiracy. He is not nor has he ever claimed to be clairvoyant. It is unreasonable to expect Petitioner to testify, inform or otherwise discuss his relationship with Dunaway when the matter was never probed during the debriefing sessions.

Neither Crock nor Mysliwiec attempted to elicit from Petitioner information concerning Dunaway. Had they done so, Petitioner would have provided the information. Petitioner invariably cooperated fully, truthfully and completely. Clearly, if the Court of Appeals intended to "hang its hat" on Petitioner's

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4. Petitioner did provide information about pharmaceuticals and Derrick. Upon learning of the "cocaine for pill transactions" that took place between Petitioner and Derrick, Crock referred Petitioner to Karen Mysliwiec ("Mysliwiec"), a D.E.A. investigator for further debriefing. Like Crock, Mysliwiec questioned Petitioner concerning *his dealings with Derrick*. There were no questions seeking information about Dunaway, or other members of his conspiracy; nor were there questions asked regarding Derrick's alternate sources of prescription drugs. (Mysliwiec Tr., 11/6/91 at pp. 38-42).

alleged violation of the informal immunity agreement as a result of this imagined omission, additional fact finding was mandated to determine what Petitioner omitted and what the government agents specifically asked of Petitioner to allow a court to reach this conclusion.

Surprisingly, in addition to the Court of Appeals unsubstantiated factual determination that Petitioner violated his informal immunity agreement, the panel also applied an incorrect legal standard in determining what constitutes a breach. Assuming, *arguendo*, that Petitioner failed to provide full, truthful and complete disclosure at the debriefings, neither the Court of Appeals nor the district court addressed the crucial issue of whether Petitioner's disclosures substantially complied with the government's requests or whether the non-disclosure constituted a substantial and material breach of the immunity agreement.

In *United States of America v. Fitch*, 964 F.2d 571 (6th Cir. 1992), the Sixth Circuit Court of Appeals established a uniform standard to be applied when determining whether an informal immunity agreement has been breached:

> Although an inadvertent omission or oversight would not rise to the level of a materially false statement so as to constitute a breach of the agreement, a bad faith, intentional, substantial omission. . . does constitute a materially false statement and thereby a breach of the agreement.

Fitch, 964 F.2d at 574. Thus, at a minimum, in the instant case, the Court of Appeals was required to apply the *Fitch* standard to determine whether Petitioner's alleged *minor* omission constituted a material breach of the immunity agreement. Because the courts failed to utilize this standard, Petitioner requests this Court to

remand the case to the district court for an evidentiary hearing on the issue of breach.

An agreement not to prosecute is contractual in nature, and subject to contract law standards. *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986).[5] Courts are split on the appropriate burden of proof: (1) preponderance of evidence standard, *Packwood*, 848 F.2d at 1011 (plea agreement); or (2) "adequate evidence" standard. *United States v. Gonzales-Sanchez*, 825 F.2d 572, 578 (1st Cir.), *cert. denied*, 484 U.S. 989 (1987). Neither standard was appropriately utilized by the lower courts in this case.

Incredibly, both lower courts apparently placed the burden on Petitioner to disprove the government's allegations of his lack of candor. More perplexing is the Court of Appeals failure to discuss the district court's misapplication of law and its failure to take into account the considerable cooperation that Petitioner provided by incriminating Derrick in determining substantial compliance with the agreement. *See Johnson*, 861 F.2d at 513, n. 3.

In *Brown*, the Court of Appeals for the Eighth Circuit, in addressing an alleged breach of an immunity agreement, stated:

> Because Brown raised a factual dispute on the issue of breach, *on remand the district court should hold an evidentiary hearing and determine whether Brown breached the*

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5. Significantly, conditions which will constitute a breach of an immunity agreement are governed by the agreement itself. *United States v. Packwood*, 848 F.2d 1009, 1012 (9th Cir. 1988). If an agreement has been entered into, as in this case, the government bears the burden of proving that the defendant failed to satisfy his part of a deal. *Brown*, 801 F.2d at 355. Whether a defendant has breached his immunity agreement depends, in part, on the incriminating nature of the testimony given by the defendant. *United States v. Johnson*, 861 F.2d 510, 513, n.3 (8th Cir. 1988).

> *cooperation agreement.* [T]he government has the burden of establishing a breach by the defendant if the agreement is to be considered unenforceable.

Brown, 801 F.2d at 355, quoting *United States v. Calabrese,* 645 F.2d at 1390 (citations omitted). In the case at bar, Petitioner did not breach the immunity agreement. In fact, at the hearing, Petitioner's focus was on whether Dunaway was a member of the Derrick organization. Petitioner, at a minimum, should now be permitted to testify regarding the debriefings in order to establish that he substantially complied with the agreement.

Petitioner respectfully requests this Court to consider his petition and/or remand the case to the District Court :1) in order to elicit a more complete record as to whether Petitioner actually violated the immunity agreement (via a material breach) or whether he substantially complied with it; and 2) to determine if the *government,* and not Petitioner, *can establish* all necessary facts by a preponderance of evidence.

II.

THE DISTRICT COURT DETERMINATION THAT DUNAWAY WAS NOT A MEMBER OF THE DERRICK ORGANIZATION WAS CLEARLY ERRONEOUS.

Petitioner seeks recourse in this forum, requesting review of the clearly erroneous factual and legal determinations made by the district court including its determination that Dunaway was not a member of the Derrick Organization (conspiracy).

On March 8, 1989, Assistant United States Attorney Lawrence Bunting granted Petitioner immunity from prosecution for any Tapert activity involving the Derrick organization in exchange for Petitioner's cooperation. This immunity agreement clearly

shielded Petitioner from the superseding indictment. *See* pertinent language of agreement, *infra* at page 5. Petitioner contends that based upon the record before the district court, common usage of the term "organization", and well established principles of conspiracy law, the district court erroneously determined that "Dunaway and Derrick were at best acquaintances . . . " Clearly, the district court misapplied well-established principals of conspiracy law in reaching its determination.

"Organization," as used in the immunity agreement, was merely a synonym for conspiracy; accordingly, members of Derrick's organization simply meant co-conspirators. As the district judge so eloquently commented: "organization is not a peculiar word that requires substantial definition. Organization is organization." (Court; TR. 11-6-91 at 5). Thus, stripped of rhetoric, the government's letter granted Petitioner immunity from prosecution for all of Petitioner's activity involving Derrick and any members of any narcotics conspiracies of which Derrick was a member.[6] Dunaway was clearly Derrick's co-conspirator in a conspiracy to possess controlled substances. Petitioner was therefore immune from prosecution for his conspiratorial activity with Dunaway, a significant part of which formed the basis of his indictment.

Derrick stated he traded Dunaway cocaine for pills "hundreds of times" between 1976 and 1982. (Derrick; TR. 11-6-91 at 10). Additionally, Daniel Tapert ("Daniel") and Dunaway were purchasing cocaine from Derrick. (Derrick; TR. 11-6-91 at 19-20). The testimony clearly establishes that in October 1988, Dunaway received cocaine from Derrick through Daniel. Derrick was also

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6. The agreement between Petitioner and the government was in no way limited to a specific time period; nor was it restricted to any specified conspiracy. Petitioner cooperated with the United States Attorney secure in the knowledge that he would be immunized from prosecution for *any* controlled substance conspiracy in which Derrick was involved, *regardless* of the period during which it operated.

receiving pills from both Petitioner and Daniel during the year 1988. (Derrick; TR. 11-6-91 at 23). Consequently, Petitioner's activity in the Derrick organization was immunized, and counts to which he pled guilty clearly fall within the immunized time period and constitute immunized activity.

Moreover, because he never affirmatively withdrew, Dunaway remained a member of the conspiracy at issue. Dunaway's continuous involvement in the conspiracy renders inapposite any argument that the time period during which Dunaway and Derrick traded drugs predated the conspiratorial activity for which Petitioner was immunized.

Conspiracy law in the Sixth Circuit has long held that a conspirator, once linked to the conspiracy, must affirmatively prove his/her withdrawal. The panoply of cases below, collected from various circuits, presents a comprehensive recitation of principles of conspiracy law which clearly establish Dunaway and Derrick as co-conspirators.

To avoid implication in a conspiracy, one must withdraw before an overt act is taken in furtherance of the conspiracy. *United States v. Monroe,* 552 F.2d 860, 864 (9th Cir.), *cert. denied,* 431 U.S. 972 (1977); *United States v. Washington,* 545 F.2d 972, 973 (5th Cir. 1977). If the conspirator fails to affirmatively withdraw, he will remain accountable for the acts of co-conspirators, even if he did not participate. After the performance of an overt act, the conspirator's participation in the conspiracy continues for the life of the conspiracy. Additionally, a conspiracy is presumed to continue indefinitely in the absence of an affirmative showing that it has ended. *United States v. Hamilton,* 689 F.2d 1262 (6th Cir. 1982), *cert. denied,* 459 U.S. 111 (1983); *United States v. Mayes,* 512 F.2d 637, 642-43 (6th Cir.), *cert. denied,* 422 U.S. 1008 (1975).

The standard for withdrawal is rigorous. One must take

affirmative and unequivocal action to disavow or defeat "the purpose of the conspiracy". *See United States v. Lash*, 937 F.2d 1077, 1083-84 (6th Cir. 1975), *cert. denied sub nom.*, 112 S. Ct. 397 (1991). The burden rests with the conspirator to prove, if possible, that he or she withdrew from the conspiracy. *United States v. Bradsby*, 628 F.2d 901 (5th Cir. 1980). There also exists a presumption that the conspirator continues as a participant for the duration of the conspiracy, absent proof of a clearly manifested intent to withdraw. *United States v. Panebianco*, 543 F.2d 447, 453 (2nd Cir. 1976), *cert. denied sub nom.*, 429 U.S. 1103 (1977). Here no such intent was ever manifested.

Neither mere "cessation" of activities with conspirators nor purposeful disassociation with conspirators is sufficient to indicate withdrawal. *United States v. Heckman*, 479 F.2d 726, 729 (3rd Cir. 1973). Most significantly, once a conspiracy has been established, only slight evidence is necessary to connect a defendant with the conspiracy. *United States v. Chambers*, 382 F.2d 910 (6th Cir. 1967); *Mayes, supra.*

Testimony at the hearing indisputably established Dunaway and Daniel as Derrick's co-conspirators. Dunaway exchanged pills with Derrick for cocaine on a continuous basis, as did Daniel. Dunaway would also received pills from Petitioner to supply others. (R.44 at 2-3). Any transaction in which Petitioner supplied pills to Daniel or to Dunaway (to enable Dunaway or Daniel to purchase cocaine from Derrick) is therefore immunized by the agreement.

Because Derrick was arrested on October 11, 1988, Petitioner does not contend activity subsequent to that date is automatically immune from prosecution.[7] However, the immunity agreement clearly immunized any activity falling within the period set forth in

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7. Although it is clear that the arrest of a co-conspirator does not terminate the conspiracy.

the indictment. The activity which formed the basis of the guilty plea to count sixty-seven occurred on August 19, 1988, during the life of the Derrick organization. Further, dismissed counts sixty-nine and seventy-two involve deliveries to Dunaway, by Petitioner. This activity also occurred during the "life" of the Derrick organization and was therefore immunized. (*See* R.44 at counts 67, 69, 72). Derrick's testimony unequivocally established Dunaway as a member of his organization.

The foregoing testimony establishes an ongoing conspiratorial relationship.[8] The Derrick conspiracy was a conspiracy in which Petitioner and Dunaway were participants, therefore, Petitioner's activity charged in counts sixty-seven, sixty-nine, and seventy-two was immunized.

At the conclusion of the motion hearing testimony, the district court denied Petitioner's motion to dismiss. Petitioner is quick to point out, however, that due to a conflict, his attorney, Mr. Richard Lustig, was unable to examine Derrick directly. (Court; TR. 11-6-91 at 26; *see also,* R.124). Accordingly, the testimony regarding the activities of Derrick and the members of his organization was not fully developed. Additionally, Dunaway's testimony, which would have established the conspiratorial relationships, was never obtained due to Dunaway's assertion of his Fifth Amendment privilege against self-incrimination. Petitioner contends Dunaway's testimony could now be taken to provide a complete picture of the conspiracy. His testimony would clearly reaffirm that Petitioner's activity with Dunaway was

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8. As the Sixth Circuit recognized in *United States v. Mayes,* 512 F.2d 637 (6th Cir. 1975), in any large organization, legal or illegal, it is common that willing participants will not be acquainted with all of the members of the organization, and may not even know the nature of every aspect of the operation. Further, a single conspiracy is not transformed into several distinct conspiracies merely because a conspiracy continues over a long period of time and may contemplate the commission of many illegal acts. *Braverman v. United States,* 317 U.S. 49 (1942).

encompassed by the immunity agreement.

Therefore, at a minimum, this court should remand this matter to the district court for further proceedings to obtain additional information regarding the activity.

III.

A CLAIM OF IMMUNITY IS A "JURISDICTIONAL" CLAIM UNDER THE *"BLACKLEDGE-MENNA"* DOCTRINE, THEREBY EXCEPTING SUCH CLAIM FROM THE GENERAL RULE FORECLOSING AN APPEAL BY A DEFENDANT WHO PLEADS GUILTY PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Although the Court of Appeals appears to have refrained from specifically ruling whether Petitioner waived his right to appeal determinations of the District Court due to his guilty plea, Petitioner asserts that the question presented is one of major jurisprudential significance. Petitioner recognizes that he did not expressly preserve his right to appeal the government's violation of the informal immunity agreement, but urges this Court to consider whether a claim of immunity is jurisdictional, thereby placing it within the *Blackledge-Menna* exception to Rule 11 of the Federal Rules of Criminal Procedure (hereinafter "Rule 11").

In its response to Petitioner's appeal to the Sixth Circuit Court of Appeals, the government, relying upon *United States v. Pickett,* 941 F.2d 411 (6th Cir. 1991), asserted that a defendant who pleads guilty pursuant to a Rule 11 plea agreement generally forecloses all subsequent appeals to his conviction. The government acknowledged the exception promulgated in Rule 11 (a)(2) (allowing a defendant to reserve the right on appeal . . . to review the adverse determination of any specified pre-trial motion), but failed to cite the well-entrenched jurisdictional exceptions

established by the federal judiciary under the *Blackledge-Menna* Doctrine. It is under the backdrop of the Blackledge-Menna Doctrine that Petitioner requests this Court to entertain this Petition. Whether a defendant's immunity defense translates into a "jurisdictional" exception, thereby surviving a guilty plea pursuant to Rule 11, unquestionably is an issue of major jurisprudential significance.

The federal judiciary has thus far articulated three specific jurisdictional claims:

(1) Claims of prosecutorial vindictiveness (*Blackledge v. Perry*, 417 U.S. 21 (1974));

(2) Claims of double jeopardy (*Menna v. New York*, 423 U.S. 61, 62 (1975)); and,

(3) Claims that an indictment failed to state a claim (*United States v. Caperell*, 938 F .2d 975, at 978-79 (9th Cir. 1991)).[9]

Petitioner asserts that a claim of immunity falls squarely into the third exception.[10]

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9. A "jurisdictional" claim is commensurate with the government being precluded from prosecuting a defendant. *See United States v. Cortez*, No. 89-50670, slip op. at 10229 (9th Cir. Aug. 24, 1992), citing *Menna*, 423 U.S. at 62 and *Blackledge*, 417 U.S. at 30 (a defendant is not precluded from appealing an adverse determination where "the charge is one which the government constitutionally may not prosecute") It is for this Court to determine the appropriate label to apply to Petitioner's immunity defense, *i.e.*, jurisdictional or nonjurisdictional, in order for it to decree whether Petitioner has the right to appeal the district court's order without specifically retaining the right in the Rule 11 plea agreement.

10. An immunity defense in support of a motion to dismiss translates into a failure to state a claim. *Krohn v. United States*, 742 F.2d 24, 29 (1st Cir 1984). (Cont'd)

Significantly, should a determination be made that an immunity defense falls outside the parameters of the third jurisdictional exception, it should be noted that the federal judiciary has not precluded additional categories of jurisdictional exceptions. Indeed, the courts have indicated that determining whether a claim is jurisdictional or nonjurisdictional remains murky at best. The courts have ascertained that, the dividing line between constitutional claims waived by a plea of guilty and those that survive the plea is not always clear. *Caperell,* 938 F.2d 975, 977, citing *United States v. Montilla,* 870 F.2d 549 (9th Cir 1989). Other circuits addressing this issue have also reached the same conclusion. *See United States v. Rivera,* 493 U.S. 998 (1989); *O'Leary v. United States,* 856 F.2d 1142, 1143 (8th Cir. 1988) (per curiam); *United States v. DeFonzio,* 444 U.S. 1018 (1980).

Similarly, federal courts adhering to the *Blackledge-Menna* doctrine have recognized the significance of certain constitutional claims and the need for the appealability of those claims. The judiciary has woven a well defined, common-thread among the cases thus far having been assessed to fall within the category of "jurisdictional" claims:

> Upon review of Blackledge . . . and Menna . . . it is certain the preclusive effects of guilty pleas do not apply to constitutional claims which go to the very power of the State to bring the defendant into court to answer the charge brought against him.

See United States v. Gaertner, 583 F.2d 308, 311 (7th Cir. 1978). Clearly, Petitioner's immunity agreement prevented the government from haling Petitioner into district court to defend

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(Cont'd)
Inferentionally then, the district court had no jurisdiction because the government was prohibited from bringing the indictment based on the executed immunity agreement.

against an indictment which violated his immunity agreement.

Based on the foregoing analysis, Petitioner respectfully requests that this Court grant his petition in order to clarify whether an immunity defense falls within the holdings of *Blackledge* and *Menna* and their progeny.

IV.

AN APPELLATE COURT IS EMPOWERED TO REVIEW THE RULEMAKING PROCESS UTILIZED IN ENACTING THE UNITED STATES SENTENCING GUIDELINES.

Petitioner assigns error to the Court of Appeals decision precluding appellate review of the pertinent rulemaking process utilized in enacting the United States Sentencing Guidelines.[11]

Despite conceding the applicability of § 553 of Title 5 ("§ 553") to the sentencing commission's rulemaking process,[12] the government sought to bar judicial review of the commission's compliance with the rulemaking requirements of § 553. Although congress expressly subjected the sentencing commission to the notice and hearing requirements of § 553, the government endeavored to deprive Petitioner of a "remedy" in the form of judicial review. Regrettably, the Court of Appeals agreed with the government's reasoning that judicial review is unavailable.

The Court of Appeals relied largely on the poorly-reasoned

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11. Petitioner specifically contests the adequacy of the statement of purpose included in the federal register and the ability of the public to evaluate the substance of guideline § 2D1.1 and its related application notes.

12. The provisions of §553 of Title 5 relating to publication in the federal register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

decision of *United States v. Lopez*, 938 F.2d 1293 (D.C. Cir. 1991). There, the Court of Appeals concluded that Congress' election to apply § 553 to the Sentencing Commission created an inference that none of the other provisions of the Administrative Procedures Act (APA) applied to the Commission's rulemaking, including those provisions affording judicial review. This purported principle of statutory construction, if applicable, cannot overcome the strong presumption of reviewability of agency actions. *Celanese Chemical Co., Inc. v. United States*, 632 F.2d 568 (5th Cir. 1980); and *Natural Resources Defense Council, Inc. v. Securities & Exchange Commission*, 606 F.2d 1031 (D.C. Cir. 1979).

An overwhelming number of federal courts, as well as the APA itself, favor judicial review of agency actions. To overcome the presumption of reviewability, an agency must demonstrate, by clear and convincing evidence, Congress' intent to deny an aggrieved person access to the judicial system, a right most individuals deem guaranteed by the United States Constitution.

Here, Congress specifically sought to insure the Sentencing Commission's compliance with the rulemaking procedures imposed by § 553. If Congress had desired to bar judicial review of the Sentencing Commission's adherence to § 553, Congress would have so stated. In light of Congress' express adoption of § 553, and the presumption of reviewability long extant, this court should not, by inference, find that Congress intended to abrogate a person's right to judicial review of the Sentencing Commission's rulemaking procedures. Federal courts should require more than an inferential leap to overcome a well-entrenched and strongly reasoned presumption favoring judicial review of agency conduct.

Moreover, in barring judicial review, the *Lopez* court misconstrued and misapplied the following excerpt of the legislative history of § 994(x) of Title 28:

> It is . . . not intended that the guidelines be

> subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.

This excerpt reveals solely that Congress intended to prohibit judicial review of the "guidelines", themselves, and not the rulemaking process necessary to enact the guidelines. As the second sentence of the excerpt suggests, there exists no reason for judicial scrutiny of the guidelines due to the ample opportunity "for review of the guidelines by the Congress and the public . . ." This opportunity will not arise, however, if the Sentencing Commission fails to satisfy the requirements of § 553 which insure adequate public notice. Petitioner contends such notice is lacking in this case.

Judicial review of the Sentencing Commission's compliance with § 553 guarantees the achievement of Congress' objective of inviting public response to any proposed guidelines. This Court should reject *Lopez's* superficial and erroneous treatment of the legislative history of § 994(x). Consistent with the widely accepted presumption endorsing judicial review, and Congress' express intention to solicit public response to the proposed guidelines, this court should examine and rule upon the Sentencing Commission's compliance with § 553.

V.

IN PROMULGATING A GUIDELINE WHICH INCORPORATES A GROSS WEIGHT BASED SENTENCING SCHEME, THE SENTENCING COMMISSION EXCEEDED ITS STATUTORY GRANT OF AUTHORITY.

When assessing the validity of Guideline § 2D1.1, this Court

must determine whether the Sentencing Commission, acted within the scope of its authority. "Any action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)." *Natural Resources Defense Council v. United States Envtl. Protection Agency,* 859 F.2d 156, 169 (D.C. Cir. 1988). The Court of Appeals never even made this necessary determination.

In contravention of its prior decisions in *Michigan Dep't. of Educ. v. United States Dep't. of Educ.,* 875 F.2d 1196 (6th Cir. 1989) and *Wayne State Univ. v. Cleland,* 590 F.2d 627 (6th Cir. 1978), wherein the Sixth Circuit articulated that courts must determine "whether regulations have been promulgated pursuant to a congressional grant of authority," and though "[agency] action is entitled to a presumption of regularity . . . it is not shielded from a thorough, probing, in-depth review." 875 F.2d at 1201, the Court of Appeals, in a conclusory manner, incorrectly determined that the Sentencing Commission's actions were not *ultra vires.*

Guideline § 2D1.1 and its various application notes fail miserably in their attempt to implement the directive of Congress. Applying the "mixture or substance" language of 21 U.S.C. § 841 to pharmaceutical drugs can lead to wildly disparate sentencing results, thus undermining the purpose for which the Sentencing Commission was established. Several drugs, such as amphetamine, methamphetamine, and phenmetrazine (Preludin) receive "active ingredient treatment" (net weight treatment) in calculating the base offense level. This automatically results in a reduced Sentencing Guideline range. The Sentencing Commission has articulated no reason for singling out certain substances for active ingredient treatment, while requiring gross weight treatment for Demerol, Didrex, Percodan, and other prescription drugs.

The Sentencing Commission has disclosed no valid reason why a distributor of one Percodan tablet should have 325

milligrams of a buffer substance, such as aspirin, included in calculating his/her base offense level, when distributors of other pharmaceutical drugs, which are no less dangerous, receive a base offense level calculated according to only the five or ten milligrams which constitute the active ingredient of the tablet.

The Sentencing Commission was established to reduce sentencing disparity, to create a fair sentencing process, and to promulgate Guidelines in order to reach these ends. Because Guideline § 2D1.1 promotes rather than reduces disparity, the Sentencing Commission's actions are outside the scope of its authority, and are therefore invalid.

Therefore, Petitioner asks this Court to grant his petition, and to conduct a proper review of the Commission's actions and to remand this matter to the district court for a proper calculation of Petitioner's Guidelines.

VI.

A GROSS WEIGHT BASED SENTENCING SCHEME VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT LEADS TO DISPARATE SENTENCES.

The Court of Appeals erred when it determined that the gross weight sentencing scheme, which leads to vastly disparate sentences, was not violative of Petitioner's Fifth Amendment due process rights.

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person . . . be deprived of life,

liberty, or property, without due process of law;

. . . .

Although there is much debate extant as to the precise definition of the due process clause[13], and the extent of its protection, it *is* well settled that due process protection prohibits arbitrary government action during the sentencing stage of a criminal proceeding. This principle was articulated by the Supreme Court in *Gardner v. Florida,* 430 U.S. 349, 358 (1977): "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." *See also, Specht v. Patterson,* 386 U.S. 605, 610 (1967); *United States v. Malcolm,* 432 F.2d 809, 815 (2nd Cir. 1970) (sentencing process must conform to fundamental principles of liberty); Comment, *Federal Sentencing Guidelines: Due Process Denied,* 33 St. Louis U.L.J. 1049, 1056 (1989) ("due process under the Fifth Amendment guarantees a fair and just sentence based on substantial evidence.").

Thus, the due process clause of the Fifth Amendment prohibits arbitrary sentencing and sentences based upon improper factors. *United States v. Wiley,* 267 F.2d 453 (7th Cir. 1959) (sentencing defendant to a longer term for exercising his right to trial is improper). A logical extension of these principles dictates that a criminal defendant must be protected from sentences which are based upon arbitrary factors.

The congressional intent behind the enhanced punishment

13. The enigmatic nature of this phrase has been recognized throughout our jurisprudence: "few phrases of the law are so elusive of exact apprehension" *Twining v. New Jersey,* 211 U.S. 78, 99-100 (1908); it "has never been, and perhaps can never be, precisely defined." *Lassiter v. Dep't. of Social Servs.*, 452 U.S. 18, 24 (1981). Though the potent protection afforded by the due process clause may be due to its lack of specificity and elusive definition, it is paramount to remember that "the essence of due process . . . bars Congress from enactments that shock the sense of fair play. . . ." *Galvan v. Press,* 347 U.S. 522, 530 (1954).

scheme of 21 U.S.C. § 841(b)(1) and Guideline § 2D1.1 is to visit harsher penalties upon violators who distribute larger quantities of controlled substances. *United States v. Savinovich*, 845 F.2d 834, 839 (9th Cir. 1988); H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986). Clearly, no significance should attach to a buffer (which merely facilitates ingestion and manipulation by patients and physicians) in determining a defendant's sentence. Tablets are pharmaceutically manufactured and deny the distributor an opportunity to control the composition of the tablet. Imposing harsher sentences based upon the weight of a buffer over which the trafficker, *i.e.*, Petitioner, lacks control ignores and eviscerates congressional intent and violates the due process clause.

The conclusion that the United States Sentencing Commission's (USSC) identical treatment of pharmaceuticals and "street drugs" was not in contravention of congressional intent is faulty for two reasons: (1) As amply set forth in Footnotes 13 and 14 of Defendant-Petitioner's Appeal Brief, the USSC did *not* choose to treat pharmaceuticals and "street drugs" identically; and (2) congressional intent clearly establishes that a "gross—weight" scheme be utilized for the more common street controlled substances, not for those "prescription substances" for which Petitioner was convicted.

Nowhere is the unconstitutional disparity of Sentencing Guideline 2D1.1 more prevalent than in the prescription drug arena. Prescription drugs are sold by dosage unit, not by weight. Petitioner never attempted to increase profits by "cutting" oxycodone or any other prescription substance with inert substances. Assuming, *arguendo*, that one could, the Guidelines still lead to arbitrary and disparate results.[14]

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14. Consider the following example: A street-level dealer purchasing Percodan tablets containing only five milligrams of oxycodone and 325 milligrams of aspirin would receive the same sentence as a corrupt chemist who

(Cont'd)

CONCLUSION

For all of the reasons stated above, Petitioner requests this Court issue a writ of certiorari or alternatively remand this matter for further proceedings in the United States District Court for the Eastern District of Michigan.

Respectfully submitted,

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(Cont'd)
is able to supply 330 milligrams of pure oxycodone to small-scale dealers who have devised a way to bootleg percodan tablets. Effectively, the latter defendant would ultimately be responsible for the dissemination of the equivalent of 66 doses of Percodan tablets, whereas the street-level dealer who sells one tablet would receive the same sentence. Clearly, this violates a defendant's due process right to be free from arbitrary sentencing applications. Basing a defendant's sentence upon the gross weight of prescription drugs distributed, rather than upon the net weight of the proscribed active ingredient also violates the defendant's right to equal protection of the law. However, as was noted in *Jones v. United States*, 463 U.S. 354, 362, n.10 (1983), an argument based on equal protection essentially duplicates an argument based on due process and therefore it will not be re-argued at this juncture.

APPENDIX A — UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ORDER DENYING MOTION TO STAY MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 92-1628

[stamped]
FILED
JUL 29 1993
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

RICHARD E. TAPERT

Defendant-Appellant

Upon consideration of the appellant's motion to stay the issuance of the mandate,

It is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

s/ Leonard Green, Jr.

APPENDIX B — UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ORDER DENYING TAPERT'S PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 92-1628

[stamped]
FILED
JUL 14 1993
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

RICHARD E. TAPERT

Defendant-Appellant

BEFORE: JONES and GUY, Circuit Judges; LIVELY, Senior Circuit Judge

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Jr.
Leonard Green, Clerk

APPENDIX C — JUDGMENT IN A CRIMINAL CASE DATED APRIL 30, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of MICHIGAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 90-80860-04

UNITED STATES OF AMERICA

V.

Richard E. Tapert

Defendant's Attorney: *Richard Lustig*

THE DEFENDANT:
pleaded guilty to count(s) *67 (Second Superseding)*

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: *21:USC:841(a)(1)*
18:USC:2

Nature of Offense: *Possession With Intent to Dist. Controlled Substances; Aiding & Abetting*

Count Number(s): *Count SS67*

The defendant is sentenced as provided in pages 2 through *4* of

Appendix C

this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count(s) *All remaining counts* are dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of $*50.00*, for count(s) *SS67*, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *375-34-5556*

Defendant's Date of Birth: *8/20/35*

Defendant's Mailing Address:
613 Lloyd Street
Royal Oak, MI 48073

Defendant's Residence Address:
613 Lloyd Street
Royal Oak, MI 48073

April 30, 1992
Date of Imposition of Sentence

s/ George La Plata
Signature of Judicial Officer

George La Plata
Name & Title of Judicial Officer

April 30, 1992
Date

Appendix C

[page 2 of 4]

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *48 months.*

* * *

The defendant shall surrender for service at the institution designated by the Bureau of Prisons, *upon disposition of Appeal proceedings. Upon surrender, bond will be canceled.*

* * *

[page 3 of 4]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *three (3) years.*

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

Appendix C

* * *

The defendant shall not possess a firearm or destructive device.

* * *

[page 4 of 4]

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: *26*

Criminal History Category: *I*

Imprisonment Range: *63* to *78* months

Supervised Release Range: *3* to *5* years

Fine Range: $*12,500.00* to $*1,000,000.00*

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

* * *

The sentence departs from the guideline range

upon motion of the government, as a result of defendant's substantial assistance.

APPENDIX D — UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OPINION DATED MAY 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-1628

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD E. TAPERT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: JONES and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM. Defendant-Appellant Dr. Richard E. Tapert, D.O., appeals his conviction and sentence for violating federal controlled substances laws. For the reasons stated herein, we affirm.

I.

This prosecution arose out of a grand jury investigation of Thomas Fredal, a registered pharmacist, and Fredal Pharmacy. Prior to initiating the grand jury investigation, diversion

investigators of the Drug Enforcement Administration (DEA) obtained Fredal Pharmacy's prescription bundles for Schedule II, III and IV controlled substance which had been dispensed by Fredal Pharmacy between 1988 and October 1990. Upon reviewing the prescriptions, the investigators determined that a large percentage of the controlled substances prescriptions appeared to have been medicine.

On October 22, 1990, a grand jury subpoena was issued to Tapert, directing him to produce certain patient files to the grand jury on October 23, 1990. Tapert appeared before the grand jury as directed. However, asserting his fifth amendment right against self-incrimination, he refused to produce the documents. The district court directed Tapert to return to the grand jury on November 6, 1990, at which time the issue of immunity would be addressed.

On November 6, 1990, the district court issued an order of immunity to Tapert, pursuant to 18 U.S.C. §§ 6002-6003 (1988). The order directed Tapert to produce the documents requested in the grand jury subpoena in exchange for immunity for the act of production and any testimony he gave concerning the authenticity of the documents, or any information directly or indirectly derived from such act and testimony.[1] Tapert complied with the order by turning the documents over to DEA Investigator Phillip Miller.

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1. The order granting immunity provided, in pertinent part:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the application heretofore made by Stephen J. Markman, United States Attorney for the Eastern District of Michigan, to grant immunity to Richard E. Tapert in accordance with Title 18, United States Code, Sections 6002-6003 be and the same hereby is allowed. It is further ORDERED that Richard E.

(Cont'd)

Appendix D

On March 29, 1991, Tapert was charged in a superseding indictment. Tapert, along with Charles Dunaway and Daniel Tapert (Daniel), were charged with conspiracy to possess with the intent to distribute and to distribute Schedule II, III and IV controlled substances, in contravention of 21 U.S.C. §§ 841(a)(1) (1988) and 846 (1988). In addition, Tapert was charged with fifteen counts of distributing controlled substances outside the usual course of professional practice and for no legitimate medical purpose, all in violation of Section 841(a)(1) and 18 U.S.C. § 2 (1988).

On June 21, 1991, Tapert filed a motion to dismiss the indictment. He argued that the prosecution was barred by the terms of a March 8, 1989 immunity agreement, entered into in relation to the investigation of Arthur Derrick. Derrick was charged with engaging in a continuing criminal enterprise for the distribution of cocaine. The agreement between the government and Tapert

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> Tapert produce and authenticate documents requested by the Grand Jury both before the Grand Jury and in the course of any trial which may be held in this district as a result of the Grand Jury investigation.
>
> *IT IS FURTHER ORDERED that the act of production and, testimony concerning the authenticity of documents as compelled under the order, or any information directly or indirectly derived from such act and testimony, shall not be used against Richard E. Tapert in any criminal case,* except that the said Richard E. Tapert shall not be exempted by this order from prosecution for perjury, giving a false statement, or contempt while giving testimony as ordered herein.

J.A. at 89-90 (emphasis added).

provided, in pertinent part, that the government would not prosecute Tapert "for any controlled substances or other criminal activity involving [Tapert and his family] and Arthur Derrick, members of his family or his organization." J.A. at 91,[2] Tapert contended that this present prosecution was barred because, he alleged, his co-Defendant in the instant case, Dunaway, was a member of the Derrick organization.

In the alternative, Tapert argued that the indictment should be dismissed because the prosecution was tainted by the government's use of patient records which he had produced to the

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2. The text of the agreement provides, in full:

> This letter will advise you of the agreement we have made with you for *your full, truthful and complete debriefing, grand jury testimony and testimony at trial,* if necessary. *The Government agrees, based on your full cooperation as indicated, that neither you, your wife nor your children will be prosecuted for any controlled substances or other criminal activity involving yourself and them and Arthur Derrick, members of his family or his organization, nor for any criminal conduct in which you were involved and which you have revealed to the Government.*
>
> The Government will make no efforts to suspend your license to practice osteopathy or to prescribe and dispense controlled substances, nor will the Government provide information regarding these matters to any osteopathic or other licensing board or agency. However, your files are subject to review by DEA Diversion Investigators, without notice, for the two year period immediately following the date of this agreement.

J.A. at 91 (emphasis added).

grand jury pursuant to the November 6, 1990 court order. Specifically, Tapert argued that the government improperly used the contents of the records to secure the indictment against Tapert and to aid in its investigation.

A hearing on Tapert's motion to dismiss was held on November 6, 1991. Testimony at the hearing was limited to the question of whether Dunaway was a member of the Derrick organization. The testimony at the hearing revealed the following:

Derrick pled guilty to a three-count information, charging him with engaging in a continuing criminal enterprise and tax evasion between January 1985 and October 1987. Derrick testified that from approximately 1976 or 1977 to 1982, he gave Dunaway cocaine in exchange for pills. They made these exchanges hundreds of times over the five to six year period. In addition, Derrick said that Tapert gave Derrick prescriptions for drugs and that Tapert gave Dunaway prescriptions for drugs which Dunaway gave to Derrick.

Derrick testified that the following happened between 1985 and 1987: 1) he became involved with selling large quantities of cocaine; 2) Tapert held cocaine and money for him; and 3) Tapert and Daniel gave pills to him.

Derrick testified that he did not see Dunaway from 1982 to 1988 when he accidentally ran into him at Daniel's home. Derrick was delivering cocaine to Daniel while Dunaway was present. The two did not talk.

Richard Crock, the case agent in the Derrick investigation, also testified. Crock first began investigating Tapert in late 1987 or early 1988. The focus of his investigation, which led to Derrick's prosecution, was Derrick's wholesale distribution of cocaine.

Appendix D

Other than Tapert's statements made during a debriefing pursuant to the immunity letter, Crock had no information that Derrick was trading cocaine for pills at any time.

Crock had referred Tapert to DEA diversion investigators for a debriefing concerning the illegal distribution of prescription drugs. At Tapert's debriefing, he told Investigator Karen Mysliwiec that he had given Derrick and Derrick's wife prescriptions for pills. Tapert also told Mysliwiec that it was a coincidence that he was giving Derrick illegal prescriptions at the same time that he, Tapert, was receiving cocaine from Derrick. According to Tapert, his illegal distribution of controlled substances to the Derricks was an aberration in his otherwise legitimate medical practice. Tapert made no mention of Dunaway at the debriefing.

On November 8, 1991, the district court denied Tapert's motion, finding that Dunaway was not part of the Derrick organization. In addition, the court found that even if Dunaway was part of the Derrick organization, the motion to dismiss the indictment would be denied because Tapert, by not telling the government about his dealings with Dunaway, failed to give full, truthful and complete information as was required under the March 8, 1989 agreement. The court further concluded that the government's prosecution was not tainted by any use of the content of Tapert's patient records in securing the indictment against Tapert.

On December 4, 1991, Tapert entered into a plea agreement with the government, pursuant to Rule 11 of the Federal Rules of Criminal Procedure. Tapert agreed to plead guilty to one count of the indictment, charging him with the illegal distribution of secobarbital. In addition, Tapert agreed to fully cooperate with the government. In exchange, the government agreed to move for a

downward departure if Tapert's cooperation amounted to substantial assistance.

The plea agreement incorporated a set of sentencing guideline worksheets which were prepared by the government. An addendum to the worksheets identified all of the illegal distributions which the government contended comprised Tapert's relevant conduct. Based upon the distributions identified in the addendum, the government took the position that Tapert's base offense level was twenty-six. Tapert specifically reserved the right to dispute two issues relating to the plea agreement:

> The addendum to the worksheets sets forth the total number of prescriptions and the total number of dosage units of controlled substances with regard to which the government believes that defendant acted outside the ordinary course of legitimate medical practice. Defendant reserves his right to dispute the following issues which relate to the computation of the appropriate guideline range: (1) whether some of the prescriptions identified on the addendum to the worksheets were issued within the ordinary course of legitimate medical practice; and (2) the weights to be utilized in converting the dosage units of controlled substances to their heroin equivalency when the specified amount of dosage units are known.

J.A. at 124.

The government, including the probation department,

contended that the total weight of the pills or tablets, including both controlled and non-controlled ingredients, should be used to determine the heroin equivalents for purposes of calculating Tapert's base offense level. Tapert argued that only the weight of the controlled substance contained in each pill or tablet should be considered in computing his base offense level.

Tapert's sentencing hearing was held on April 30, 1992. At that time, the court rejected Tapert's argument by sentencing him in accordance with the probation department's recommendation. After figuring in Tapert's substantial assistance to the government reduction, Tapert was sentenced to forty-eight months of imprisonment.

II.

Tapert first contends that the district court erred in denying his motion to dismiss the indictment based on his immunity agreement and his immunized testimony which he gave pursuant to a court order.[3]

A.

With regard to the immunity agreement, we hold that the district court's finding that Tapert failed to give full, complete and truthful testimony concerning Dunaway's part of the Derrick organization is not clearly erroneous. *United States v. Fitch*, 964

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3. The government also contends that Tapert waived his right to appeal those determinations. Specifically, the government contends that Tapert foreclosed these specific appellate issues by pleading guilty. Because we find that the district court did not err in denying Tapert's motion to dismiss the indictment, we refrain from addressing the government's argument that Tapert waived his right to appeal these issues.

F.2d 571, 574 (6th Cir. 1992); *see also United States v. Plummer*, 941 F.2d 799, 803 (9th Cir. 1991) (the interpretation of an informal immunity agreement, which is like a contract, is a factual determination which is reviewed under the clearly erroneous standard).

Tapert's immunity agreement provides that "[t]his letter will advise you of the agreement we have made with you for your *full, truthful and complete* de-briefing, grand jury testimony and testimony at trial, if necessary." J.A. at 91. According to the agents who debriefed Tapert, Tapert did not disclose that Dunaway was part of the Derrick organization or that he and/or Derrick were trading pills for drugs with Dunaway. Assuming, *arguendo*, that Dunaway was part of the Derrick organization, Tapert's failure to disclose this information violated his immunity agreement. As a result, the district court's finding in this regard is not clearly erroneous.

B.

Tapert also contends that the indictment should be dismissed because the district court's November 6, 1990 order granting Tapert immunity for his act of producing patient records and any testimony authenticating those records was not complied with by the government. The issue Tapert raised before the district court was whether the prosecution was tainted by the government's use of the *contents* of patient records which he was compelled to produce pursuant to a district court order based on 18 U.S.C. § 6003. Specifically, Tapert argued that the government used information contained in the records to prove that the prescriptions were not issued in the ordinary course of legitimate medical practice, to refresh a witness' testimony, to continue its investigation, and to identify additional witnesses. Because Tapert's immunity did not cover the contents of the patient records,

but rather the act of producing the records and any testimony authenticating the records, the district court held, citing *United States v. Doe*, 465 U.S. 605, 611-12 (1984), that the contents of the patient records were not protected.

On appeal, Tapert contends, pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), that the district court erred by not having the government prove at a hearing that all the evidence used to indict Tapert derived from sources independent of the immunized act. Tapert raises this argument for the first time on appeal.

This Court will not consider arguments raised for the first time on appeal absent exceptional circumstances or unless failure to consider the issue will result in a plain miscarriage of justice. *See, e.g., United States v. Pickett*, 941 F.2d 411, 415 (6th Cir. 1991). We find that this case does not present exceptional circumstances or that there will be a miscarriage of justice by not considering this issue. Therefore, we decline to review this issue.

III.

Tapert next challenges the sentencing scheme of the United States Sentencing Commission's *Guidelines Manual*, § 2D1.1 (1991) [hereinafter "U.S.S.G."], to the extent that it required the district court to use the gross weight of illegally distributed prescription drugs, rather than only the weight of the controlled substances contained in the drugs, to calculate his base offense level. Tapert argues that the gross weight approach to calculating a sentence range for distributors of prescription drugs is contrary to Congressional intent as expressed in 21 U.S.C. § 841. Tapert also argues that the gross weight approach violates due process because it imposes harsher sentences based on the weight of legal substances over which a trafficker lacks control.

Appendix D

A.

Tapert first contends that the gross weight approach for calculating an appropriate base offense level, as set forth in U.S.S.G. § 2D1.1,[4] is contrary to the penalty provisions of 21 U.S.C. § 841. Specifically, he argues that, pursuant to Section 841, Congress expressed an intention to consider the entire weight of a "mixture or substance" only with regard to several enumerated drugs, *see supra* note 4, commonly referred to as "street drugs." The terms "mixture or substance" are part of subsections

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4. Section 2D1.1(c) includes the following heading and discussion:

> Controlled substances and Quantity* . . .
>
> * Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

In addition, Application Note 10 of Section 2D1.1 provides, in part:

> The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs. For example, one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of five kilograms of marihuana in applying the Drug Quantity Table.

841(b)(1)(A) and (B), the provisions which provide the penalties for distribution of street drugs. Subsections 841(b)(1)(C) and (D), which provide the penalties for pharmaceutical drug distribution, do not contain those terms. Tapert concludes, by negative implication, that Congress must have intended that the sentencing court employ the net weight of the active ingredients (i.e., controlled substance) of pharmaceuticals, rather than their gross weight, when calculating the base offense level because Congress did not specifically say to use the total weight.

A court may set aside a sentencing guideline only if it contravenes an unambiguously expressed intent of Congress or is unreasonable. *See United States v. Shabazz*, 933 F.2d 1029, 1035 (D.C. Cir.) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)), *cert. denied*, 112 S. Ct. 431 (1991).

Several courts have rejected Tapert's argument or similar arguments. *See Shabazz*, 933 F.2d at 1036; *United States v. Lazarchik*, 924 F.2d 211, 214 (11th Cir.), *cert. denied*, 112 S. Ct. 96 (1991); *United States v. Bayerle*, 898 F.2d 28, 31-32 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990).

In *Shabazz*, the court stated:

> Appellants invite us to make two leaps of inference above and beyond the familiar *expressio unius est exclusio alterius:* from the proposition that for certain controlled substances Congress *required* consideration of the gross weight *for purposes of determining what statutory range is applicable*, appellants would have us conclude that for all other

> controlled substances Congress *forbade* (as opposed to simply not requiring) consideration of the gross weight *for purposes of determining an appropriate point within the applicable range*. We are aware of no "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9 . . . that would compel appellants' proposed reading. Therefore, we hold that section 2D1.1 of the guidelines, in requiring that appellants be sentenced according to the gross weight of dilaudid [a pharmaceutical drug], violates no unambiguously expressed congressional intent.

933 F.2d at 1036. The court concluded:

> Because we can imagine no relevant difference between pharmaceutically manufactured drugs like dilaudid and the eight controlled substances that Congress has expressly singled out for gross-weight treatment, we hold that the Sentencing Commission did not act unreasonably in also treating pharmaceuticals the same way.

Id. at 1037 (footnote omitted).

In *Lazarchik*, the Eleventh Circuit noted and held:

> It is true that subsections 841(b)(1)(A) and (B), which provide penalties for distribution of 'street drugs', include the language 'mixture or substance containing a detectable amount of

> . . .' while the provisions for pharmaceutical distribution do not. However, this does not imply a Congressional intent to measure pharmaceuticals and street drugs differently. A more careful reading of the statute shows that with regard to "street drugs", Congress varied the statutory maximum and minimum penalties by weight, and therefore it was necessary that the statute specify whether the weight of the entire mixture was included or only the weight of the pure substance. However, with regard to the illegal distribution of pharmaceuticals, Congress provided for a single statutory sentencing range for each Schedule, regardless of the amount of the substance distributed. Therefore, because no statutory penalty distinctions are made on the basis of weight for pharmaceuticals, there was no need to specify within the statute how pharmaceutical weights should be calculated. Accordingly, we find no merit in appellant's argument that this statute compels the use of net weights in calculating the heroin equivalency of pharmaceuticals under the Guidelines.

924 F.2d at 214 (footnotes omitted).

We find the rationales expressed in *Shabazz* and *Lazarchik* persuasive. We find it neither unreasonable nor contrary to Congressional intent for the Sentencing Commission to treat pharmaceuticals the same way as "street drugs" even though it is not required by Section 841. "It is entirely appropriate that the Sentencing Commission should choose to adopt the same method

for computing the weight of pharmaceuticals that Congress chose for § 841(b)(1)(A)-(B) substances." *Lazarchik*, 924 F.2d at 214 n.4. As a result, we reject this contention.

B.

Tapert next contends that the gross weight approach in U.S.S.G. § 2D1.1 offends his Fifth Amendment due process rights. Tapert argues that the scheme violates notions of substantive due process because it treats equally a person convicted of illegally distributing controlled substances that have been diluted and a person convicted of selling the same weight-based quantity of "pure" controlled substances. Tapert also notes that in the context of prescription drugs, the gross weight scheme is unfair because the seller has no control over the composition of the ingredients.

Similar arguments have been rejected. *See Chapman v. United States*, 111 S. Ct. 1919, 1928-29 (1991) (LSD); *Bayerle*, 898 F.2d at 31-32 (pharmacological drugs); *see also Shabazz*, 933 F.2d at 1036-37 (pharmaceutical drugs).

In *Chapman*, the Court was faced with a question of whether the weight of a carrier (in that case, the carrier was blotter paper, a carrier commonly used to distribute LSD) could be used when computing the appropriate sentence for LSD distribution. The Court held "that the statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD, and this construction is neither a violation of due process, nor unconstitutionally vague." *Id.* at 1929.

The Supreme Court stated that when a person has been convicted, that person is eligible for whatever punishment is authorized by statute for his offense, "so long as the penalty is not

based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Id.* at 1927. The Court noted:

> The penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level. . . . By measuring the quantity of drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity.

Id. at 1927-28. The Court held that the sentencing scheme "rational." *Id.* The Court also held that the sentencing scheme did not violate due process, even though distributors selling different numbers of doses of LSD, and therefore, with arguably different degrees of culpability, would be subject to the same minimum sentence because of choosing different carriers. *Id.*

In *Bayerle*, 898 F.2d at 31-32, the Fourth Circuit held that the Drug Equivalency Tables did not violate defendants due process rights even though defendant's sentencing was based on gross weight of pharmacological drugs. The court noted that the equivalency tables complained of were simply an extension of the gross weight scheme of 21 U.S.C. § 841(b)(1). *Id.* at 31. The court had previously upheld the gross weight scheme of Section 841(b)(1), finding that the equivalency tables were rationally related to the legislative goal of "sentencing criminals involved in the upper echelons of drug distribution more heavily than those

less importantly involved."[5] *United States v. Whitehead*, 849 F.2d 849, 859-60 (4th Cir.), *cert. denied*, 488 U.S. 983 (1988).

In *Shabazz*, the court noted and rejected an argument similar to Tapert's:

> Appellants point out that dealers of dilaudid tablets — unlike cocaine dealers, for example — cannot "cut" or dilute their product. They can, however, choose whether they want to sell tablets containing one, two, three, or four milligrams of hydromorphone. *See Physicians' Desk Reference* [1143 (45th ed. 1991)]. As with all other controlled substances, dealers "pick their poison." [*United States v.*] *Marshall*, 908 F.2d [1312,] 1325 [(7th Cir. 1990) (en banc), *aff'd sub nom. Chapman v. United States*, 111 S. Ct. 1919 (1991)]. . . . For present purposes, the only conceivable distinction between dilaudid tablets and cocaine is that the concentration of hydromorphone, but not of cocaine, is immediately apparent to the consumer. *See Physicians' Desk Reference* at 413. Thus, a dilaudid dealer, by switching from four-milligram tablets to one-milligram tablets,

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5. The "upper echelon" of drug distribution includes " 'trafficker(s) in a high place in the processing and distribution chain' and the 'managers of the retail level traffic' selling 'substantial street quantitites.' " *United States v. Whitehead*, 844 F.2d 849, 859 (4th Cir.) (citing H.R. Rep. No. 845, 99th Cong., 2d Sess., pt. 1, at 11-12 (1986) (Report of the House Committee of the Judiciary)), *cert. denied*, 488 U.S. 983 (1988).

> presumably cannot increase his profits the way a cocaine dealer can by diluting his 100% pure product by a factor of four. That distinction makes a difference, however, only if the gross-weight rule was intended to protect consumers of illegal drugs from being defrauded by unscrupulous dealers who would sell them a product more diluted than they have bargained for. Obviously this is not a purpose of the rule.

933 F.2d at 1036-37.

Although the *Shabazz* court did not deal with whether the sentencing scheme violated *due process* because the guidelines treated similarly pharmaceutical drugs to "street drugs," we find the court's analysis persuasive. While pharmaceutical dealers may not be able to dilute their product, they are able to control the quantity distributed.[6] Moreover, the District of Columbia Circuit is

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6. The government also argues that Tapert was able to determine the quantity of controlled substances actually contained in the prescription drugs he illegally distributed. It states:

> For example, Tapert does not dispute that he illegally distributed 610 dosage units of Percodan and 82 dosage units of Percocet-5. Both Percodan and Percocet-5 contain approximately 4.50 milligrams of oxycodone. *See Physicians' Desk Reference* at 929-30. Oxycodone, however, is contained in a variety of other prescription drugs in varying amount. Percodan-demi contains only 2.25 milligrams of oxycodone while Roxicodone Intensol contains 20 milligrams of oxycodone. *Id.* at 930, 1929. To the extent that Tapert controlled which of these products he would distribute, he was able to control the

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correct when it states that dealers pick their poison. Furthermore, we note that the equivalency tables which use the gross weight schemes are simply an extension of the gross weight scheme of 21 U.S.C. § 841(b)(1) which have been upheld. *Bayerle*, 898 F.2d at 31. As a result, we find that the gross weight scheme of Section 2D1.1 is not based on any arbitrary distinction and is rationally related to the legislative goals of Section 841.

We hold that the gross weight scheme established by the Sentencing Commission, pursuant to 21 U.S.C. § 841(b)(1), is not violative of due process.

IV.

Tapert next argues that the gross-weight scheme in Section 2D1.1 must be invalidated because the Sentencing Commission failed to comply with the requirements of the Administrative Procedure Act (APA). Tapert argues: 1) the scheme does not have a "concise and general statement" concerning its purpose; 2) the scheme adopted is arbitrary and capricious; and 3) the scheme contravenes the Sentencing Commission's enabling statute. The government counters, arguing that even assuming that Tapert's argument has any merit, this court lacks authority to review the Commission's rulemaking.

The Sentencing Commission was established pursuant to the Sentencing Reform Act of 1984. 28 U.S.C. § 991(a) (1988). The Sentencing Reform Act provides that the Commission is part of the

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(Cont'd)

> quantity of the controlled substance contained in each tablet or pill.

Appellee's Br. at 19-20.

judicial branch. *Id.* In general, the APA is inapplicable to the judicial branch. 5 U.S.C. § 551(1)(B) (1988). A limited exception to this rule is embodied in 28 U.S.C. § 994(x) (1988) which provides:

> The provisions of section 553 of title 5 relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of [sentencing] guidelines pursuant to this section.[7]

In *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991), the D.C. Circuit considered the scope of the exception created by Section 994(x), and stated, "Applying the principle of *inclusio unius est exclusio alterius*, we conclude that by subjecting the promulgation of the Guidelines to this one section of the APA, Congress affirmed that the Commission's rulemaking was not subject to any other provision of the APA, including those for judicial review." *Id.*

As the court in *Lopez* observed, its decision is supported by the legislative history of the Act. Quoting from a Senate Committee Report, the court noted:

> [Section 994(x)] is an exception to the general inapplicability of the Administrative

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7. 5 U.S.C. § 553 (1988) does not require an agency adopting rules to give exhaustive reasoning for adopting a particular rule; rather, the "explanation must simply enable a reviewing court 'to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did.' " *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983) (citations omitted), *cert. denied*, 465 U.S. 1080 (1984).

Appendix D

Procedure Act . . . to the judicial branch . . . .

. . . .

> It is . . . not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.

Id. (quoting S. Rep. No. 225, 99th Cong, 1st Sess. 180-81 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3363-64 (footnote omitted)).

Based on the express language of Section 994 and consistent with the legislative intent as reflected in the Senate Report and in the reasoning in *Lopez,* we hold that this court lacks authority to review the Sentencing Commission's rulemaking process.

V.

For the foregoing reasons, we affirm.

APPENDIX E — IMMUNITY AGREEMENT

Federal Building and United States Courthouse
231 W. Lafayette, Eight Floor
Detroit, Michigan 48226

March 8, 1989

Richard E. Tapert, D.O.
1923 Crooks, #17
Royal Oak, Michigan 48073

RE: Pending Criminal Investigation

Dear Dr. Tapert:

This letter will advise you of the agreement we have made with you for your full, truthful and complete de-briefing, grand jury testimony and testimony at trial, if necessary. The Government agrees, based on your full cooperation as indicated, that neither you, your wife nor your children will be prosecuted for any controlled substances or other criminal activity involving yourself and them and Arthur Derrick, members of his family or his organization, nor for any criminal conduct in which you were involved and which you have revealed to the Government.

The Government will make no efforts to suspend your license to practice osteopathy or to prescribe and dispense controlled substances, nor will the Government provide information regarding these matters to any osteopathic or other licensing board or agency. However, your files are subject to review by DEA Diversion Investigators, without notice, for the two year period immediately following the date of this agreement.

Appendix E

Very truly yours,

ROY C. HAYES
United States Attorney

s/ Lawrence J. Bunting
Assistant United States Attorney

LJB/emw